

**528**

**DEED OF CONSERVATION EASEMENT  
SPINDLE HILL ENERGY CENTER**

THIS DEED OF CONSERVATION EASEMENT (this "Agreement") is granted on this ~~2<sup>nd</sup>~~ day of ~~July~~ <sup>August</sup>, 2006, by SPINDLE HILL ENERGY LLC, a Delaware limited liability company ("Grantor") whose address is 1 South Wacker Drive, Suite 2020, Chicago, Illinois, 60606-4656, to the TOWN OF FREDERICK, COLORADO ("Grantee" or the "Town"), whose address is 401 Locust Street, Frederick, Colorado 80530.

**RECITALS**

A. Grantor is the owner in fee simple of certain real property located in the Town of Frederick, Weld County, Colorado, more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"), subject to those encumbrances and restrictions described in Exhibit B attached hereto and incorporated herein by this reference, which includes being subject to, without limitation, the rights of certain oil and gas mineral lessees as identified in Exhibit B (the "Oil and Gas Lessees").

B. Grantee is a "qualified organization" as defined in §170(h) of the Internal Revenue Code ("IRC") and a governmental entity as required under §38-30.5-104 (2), Colorado Revised Statutes ("C.R.S").

C. The Property possesses values for open space and for outdoor recreation and education by the general public (collectively, the "Conservation Values") of great importance to Grantor, the people of the Town of Frederick, the people of Weld County and the people of the entire State of Colorado. Specifically, the Property comprises an area which will serve as a permanent buffer area for Grantee, ensures minimal development in a portion of Grantee's identified "Community Separator" area, creates connectivity by integrating the Property with the existing community through drainage basin pathways and increases open space which will be available to the public for recreational purposes. The Property and intended uses are complimentary and consistent with the Comprehensive Plan of the Town of Frederick.

D. C.R.S. §§38-30.5-101, *et seq.*, provides for the establishment of conservation easements to maintain land "predominately in a natural, scenic, or open condition, or for agricultural, horticultural, wetlands, recreational... or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity."



E. The Conservation Values and the characteristics, current use, and status of improvements on and development of the Property as of the date of this Conservation Easement are documented in the "Phase I Environmental Site Assessment, Johnson Property South Half of Section 33, NW Corner of WCR 14, and WCR 19, Frederick, Weld County, Colorado Project No. 22057721" prepared by Terracon Consultants Inc. dated January 4, 2006 ("Documentation of Present Conditions") on file at the office of Grantee, which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as an objective, though nonexclusive, information baseline for monitoring compliance with the terms of this grant.

F. Grantor intends that the Conservation Values of the Property be preserved and maintained by permitting only those land uses on the Property that do not significantly impair or interfere with them, including, without limitation, those land uses specifically described in this Conservation Easement, and Grantor further intends to make a charitable gift of the Conservation Easement in perpetuity over the Property of the nature and character and to extent conveyed by this Deed to Grantee.

#### AGREEMENT

NOW, THEREFORE, in consideration of the Recitals above which are incorporated herein and the mutual covenants, terms, conditions and restrictions contained herein, and pursuant to the law of the State of Colorado, Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth (the "Conservation Easement").

1. Purpose. The purpose of this Conservation Easement is to assure that the Property will be retained forever predominantly in its natural open space condition for recreational and educational purposes and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property. Grantor intends that this Conservation Easement will confine the use of the Property to such activities, including public recreation or education, as are deemed consistent with the purpose of this Conservation Easement and provisions of the Town Land Use Code by the Town. This purpose is in accordance with §170(h) of the IRC and C.R.S. Sections 38-30.5-101 *et seq.* In order to achieve this purpose, Grantor intends to convey this Conservation Easement to Grantee to ensure that the Conservation Values of the Property will be preserved and protected forever.

2. Intent. Subject only to the purposes set forth above, the intention of the parties is to permit all other uses of the Property that are not inconsistent with the preservation and protection of the Conservation Values and which are not expressly prohibited herein.

3. Conveyance of Conservation Easement; Contribution. Grantor hereby voluntarily grants and conveys to Grantee and Grantee hereby voluntarily accepts, a perpetual Conservation Easement in gross, an immediately vested interest in real property as defined by C.R.S. §§38-30.5-101, *et seq.*, of the nature and character described in this Agreement, for the purpose of

preserving and protecting the Conservation Values of the Property in perpetuity. In addition, Grantor hereby agrees to contribute, within ten (10) days after the recording of the approved subdivision plat for the Johnson Farms/Spindle Hill Energy Subdivision, Ten Thousand Dollars (\$10,000.00) to be placed in an interest bearing account for purposes of construction of a trail on the Property(the "Trail Fund"). The Trail Fund shall remain on deposit until such time as the Town, in partnership with Grantor or its successor, initiates construction of such trail, at which time the Trail Fund will be paid over to the Town as a contribution toward the cost of the trail. Any interest earned on the Trail Fund shall be considered a part of the Trail Fund. Grantee acknowledges this Agreement provides a significant public benefit.

4. Rights of Grantee. To accomplish the purpose of this Conservation Easement the following rights are hereby conveyed to Grantee:

- (a) To preserve, protect or enhance the Conservation Values of the Property;
- (b) To enter upon the Property in order to monitor compliance with and otherwise enforce the terms of this Conservation Easement;
- (c) To enter upon the Property and install and maintain parks, trails, ball fields and other recreational or open space uses in accordance with the Conservation Values, as undertaken by or as reasonably approved by Grantee, including the right to permit public access to the Property in accordance with the provisions of Section 18 below; and
- (c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Conservation Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to the remedies set forth in Sections 11, 12 and 13.

5. Prohibited Activities. Any activity on or use of the Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the potential for public recreation and educational activities, uses other than those related to the proposed power plant project of Grantor to be located adjacent to the Property, as approved (the "Project"), are prohibited, unless expressly approved by Grantee.

6. Reserved Rights. Grantor reserves to itself and to its successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Conservation Easement. Without limiting the generality of the foregoing, and subject to the terms of Section 5, the following rights are expressly reserved:

- (a) Installation and maintenance of and access to overhead transmission lines and the right to grant easements therefore, as associated with the Project or other facilities or uses approved by the Town and in accordance with the provisions of the Town Land Use Code;
- (b) Installation and maintenance of and access to underground utilities as

approved by the Town, including the right to grant easements for sanitary sewer, water lines, electric, cable, broad-band and telephone transmission, storm drainage and construction access easements across the Property allowing Grantor or its assignees the right to install and maintain such utilities on the Property and to accommodate storm drainage from Grantor's adjacent property;

(c) Installation and maintenance of fencing, berming and landscaping in connection with the Project;

(d) Temporary use of areas of the Property for storage and equipment laydown during the construction of the Project; and

(e) Rights of way or easements for access to adjacent properties, as approved by the Town.

In the event the surface of the Property is disturbed by Grantor or its assigns in connection with a reserved use as described above, Grantor or its assigns shall restore the surface of the Property reasonably to the grade and condition it was in immediately prior to such activity, except as may be necessary to accommodate the reserved use and shall maintain the Property in a weed free, native condition in accordance with the Town Land Use Code.

7. Maintenance of Property. Until such time as Grantee has installed improvements and/or commenced educational or recreational use of the Property, Grantor shall maintain the Property in a native state and weed free. Thereafter, Grantee shall maintain its improvements and areas of use.

8. Rights of Oil and Gas Lessees. Grantor and Grantee hereby acknowledge and agree that no existing rights of any Oil and Gas Lessees are affected by this Agreement.

9. Notice and Approval. Grantor shall give Grantee written notice of Grantor's intention to undertake any activity on the Property to render a change or improvement to the Property which is intended to remain on the Property permanently, or longer than seven days not less than thirty days prior to undertaking such improvement or activity. The purpose of requiring Grantor to notify Grantee prior to undertaking certain activities is to afford Grantee an adequate opportunity to monitor the activities in question to ensure that they are designed and carried out in a manner that is not inconsistent with the purpose of this Conservation Easement. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activities in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Conservation Easement and the provisions of the Town Land Use Code. In the event Grantor's activity is not for a specific reserved right as set forth in Section 6, above, Grantee shall have the right to reasonably determine whether the use is consistent with Conservation Values, where the use will occur, and for how long it will last. Any site disturbance created from the use of the property by either party shall be addressed by the party creating the disturbance using the best management practices including but not limited to applicable erosion control measures. All disturbances shall be restored to a pre-disturbance, native condition upon conclusion of the activity, no later than the next growing season.

10. Notice of Violation; Corrective Action. If either party determines that a violation of the terms of this Conservation Easement has occurred or is threatened by the other party, such party shall give written notice to the other party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Conservation Easement, to restore the portion of the Property so injured to its prior condition in accordance with a plan reasonably approved by both parties hereto.

11. Injunctive Relief. If either party fails to cure the violation within sixty days after receipt of written notice thereof, or under circumstances where the violation cannot reasonably be cured within a sixty day period, fails to begin curing such violation within the sixty day period, or fails to continue diligently to cure such violation until finally cured, an action may be brought at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to any such injury.

12. Damages. Either party shall be entitled to recover damages for violation of the terms of this Agreement or injury to any Conservation Values protected by this Conservation Easement, including, without limitation, damages for the loss of open space, recreational or educational values. Any damages recovered may be applied to the cost of undertaking any corrective action on the Property.

13. Emergency Enforcement. If either party, in its reasonable discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Property, or if there is otherwise a significant violation of the terms of this Agreement, such party may pursue its remedies under this Agreement without prior notice to the other party or without waiting for the period provided for cure to expire.

14. Costs of Enforcement. All reasonable costs incurred by either party in enforcing the terms of this Conservation Easement, including, without limitation, costs and expenses of suit and reasonable attorneys' fees, and any costs of restoration necessitated by violation of the terms of this Conservation Easement shall be borne by the violator; provided.

15. Forbearance. Forbearance by either party to exercise its rights under this Agreement in the event of any breach of any term of this Agreement shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Agreement or of any of the forbearing party's rights under this Agreement. No delay or omission in the exercise of any right or remedy upon any breach shall impair such right or remedy or be construed as a waiver.

16. Waiver of Certain Defenses. Each party hereby waives any defense of laches, estoppel, or prescription.

17. Acts Beyond a Party's Control. Nothing contained in this Agreement shall be

construed to entitle either party to bring any action against the other for any injury to or change in the Property resulting from causes beyond such party's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

18. Public Access. A right of access by the public to portions of the Property, as designated by Grantee or its assignee or designee, for purposes of fostering the recreational and educational Conservation Values intended to be assured by this Conservation Easement is hereby conveyed by this Conservation Easement.

19. Costs, Legal Requirements, and Liabilities. Except in portions of the Property where a right of access to the public is granted where Grantee shall undertake such responsibilities, Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted to Grantor by this Conservation Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state, and local laws, regulations, and requirements. Grantor shall keep the Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor.

20. Taxes. Grantor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of, this Conservation Easement, and shall furnish Grantee with satisfactory evidence of payment upon request.

21. Representations and Warranties. Grantor represents and warrants that, to its knowledge:

(a) Grantor and the Property are in compliance with all federal, state, and local laws, regulations, and requirements applicable to the Property and its use.

(b) There is no pending or threatened litigation in any way affecting, involving, or relating to the Property.

(c) No civil or criminal; proceedings or investigations have been instigated at any time or are now pending, and no notices, claims, demands, or orders have been received, arising out of any violation or alleged violation of, or failure to comply with, any federal, state, or local law, regulation, or requirement applicable to the Property or its use, nor do there exist any facts or circumstances that Grantor might reasonably expect to form the basis for any such proceedings, investigations, notices, claims, demands, or orders.

All references in this Agreement to the "knowledge" of Grantor or any similar phrase or



reference shall mean and refer only to the actual knowledge without investigation or duty to investigate, of Douglas B. Carter as the Vice President of Grantor.

22. Control. Except as may be established by separate written agreement in connection with any portion of the Property to which public access is granted, nothing in this Conservation Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Property, or any of Grantor's activities on the Property.

23. Extinguishment. If circumstances arise in the future that render the purpose of this Conservation Easement impossible to accomplish, this Conservation Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of the Conservation Easement, or proportionate part thereof, as determined in accordance with Section 24.

24. Valuation. This Conservation Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 22, the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Property unencumbered by the Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by (2)  $x/y$ , which is the ratio of the value of the Conservation Easement at the time of this grant to the value of the Property, without deduction for the value of the Conservation Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the IRC. For the purposes of this Section, the ratio of the value of the Conservation Easement to the value of the Property unencumbered by the Conservation Easement shall remain constant. Grantee acknowledges that as of the date hereof, the value of the Property is \$21,600 per acre.

25. Condemnation. If all or any part of the Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate, or other authority, so as to terminate this Conservation Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying that balance by the ratio set forth in Section 24.

26. Application of Proceeds. Grantee shall use any proceeds received under the circumstances described in Sections 23 or 25 in a manner consistent with its conservation purposes, which are exemplified by this grant.

27. Assignment. This Conservation Easement is transferable, but Grantee may assign

its rights and obligations under this Conservation Easement only to an organization that is a qualified organization at the time of transfer under Section 170(h) of the IRC (or any successor provision then applicable), and authorized to acquire and hold conservation easements under C.R.S. §§38-30.5-101, *et seq.*, (or any successor provision then applicable) or the laws of the United States. As a condition of such transfer, Grantee shall require that the conservation purpose that this grant is intended to advance continue to be carried out. Grantee agrees to give written notice to Grantor of an assignment at least thirty days prior to the date of such assignment. The failure of Grantee to give such notice shall not affect the validity of such assignment nor shall it impair the validity of this Conservation Easement or limit its enforceability in any way.

28. Subordination. If at the time of conveyance of this Conservation Easement, the Property is subject to a deed of trust or mortgage, the holder or beneficiary thereof shall agree by separate instrument to subordinate its rights in the Property to the extent necessary to permit Grantee to enforce the purpose of this Conservation Easement in perpetuity and to prevent any modification or extinguishment of this Conservation Easement by the exercise of any rights of the mortgage holder or the beneficiary of the deed of trust.

29. Amendment. If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate, Grantor and Grantee are free to jointly amend this Conservation Easement; provided that no amendment shall be allowed that will affect the qualification of this Conservation Easement or the status of Grantee under any applicable laws, including C.R.S. §§38-30.5-101, *et seq.*, or Section 170(h) of the IRC, and any amendment shall be consistent with the purpose of this Conservation Easement and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of Weld County, Colorado.

30. Subsequent Transfers. Grantor agrees to incorporate the terms of this Conservation Easement by reference in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantor further agrees to give written notice to Grantee of the transfer of any interest at least thirty days prior to the date of such transfer. The failure of Grantor to perform any act required by this Section shall not impair the validity of this Conservation Easement or limit its enforceability in any way.

31. Estoppel Certificates. Upon request by Grantor, Grantee shall within thirty days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Conservation Easement or otherwise evidences the status of this Conservation Easement. Such certification shall be limited to the condition of the Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's sole expense, within thirty days of receipt of Grantors' written request therefore.

32. Notices. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served



personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantor: Spindle Hill Energy LLC  
c/o Invenergy, LLC  
1 Wacker Drive, Suite 2020  
Chicago, IL 60606-4656  
Attn: General Counsel

To Grantee: Town of Frederick, Colorado  
401 Locust Street  
Frederick, CO 80530  
Attn: Mayor

or to such other address as either party from time to time shall designate by written notice to the other.

33. Recordation. Grantor shall record this instrument in timely fashion in the official records of Weld County, Colorado.

34. General Provisions.

(a) Controlling Law. The interpretation and performance of this Conservation Easement shall be governed by the laws of the State of Colorado.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be liberally construed in favor of the grant to effect the purpose of this Conservation Easement. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Conservation Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Agreement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Conservation Easement, all of which are merged herein.

(e) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

(f) Captions. The captions in this instrument have been inserted solely for

convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

(g) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

35. Successors. The covenants, terms, conditions, and restrictions of this Conservation Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The terms "Grantors" and "Grantee," wherever used herein, and any pronouns used in place thereof, shall include, respectively, the above-named Grantors and their personal representatives, heirs, successors, and assigns, and the above-named Grantee and its successors and assigns.

36. Termination of Rights and Obligations. A party's rights and obligations under this Agreement terminate upon transfer of the party's interest in the Conservation Easement or the Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(Signatures on following page.)

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever.

IN WITNESS WHEREOF, Grantor and Grantee have set their hands on the day and year first above written.

"Grantor":

Spindle Hill Energy LLC, a Delaware limited liability company

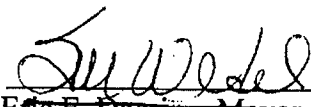
By

  
Douglas B. Carter, Vice President

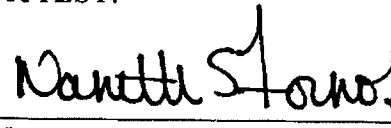
"Grantee":

Town of Frederick

By

  
~~Eric E. Duerling, Mayor~~  
Sue Wedel, Mayor pro Tem

ATTEST:

  
Nanette S. Fornof, Town Clerk





3408528 08/02/2006 04:02P Weld County, CO  
12 of 13 R 66.00 D 0.00 Steve Moreno Clerk & Recorder

STATE OF COLORADO )

COUNTY OF Arapahoe )

ss.

The foregoing instrument was acknowledged before me this 27<sup>th</sup> day of July, 2006 by Douglas B. Carter as Vice President of Spindle Hill Energy LLC, a ~~Delaware~~ limited liability company.

My commission expires: 9/10/08

SEAN LOGSDON  
NOTARY PUBLIC  
STATE OF COLORADO

Witness my hand and official seal.

My Commission Expires 09/10/2008

Sean Logsdon  
Notary Public

STATE OF COLORADO )

COUNTY OF WELD )

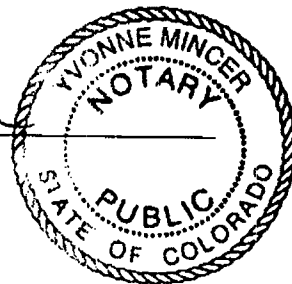
ss.

The foregoing instrument was acknowledged before me this 2<sup>nd</sup> August day of ~~July~~, 2006 by ~~Eric E. Doering as Mayor~~ and Nanette S. Fornof as Town Clerk of the Town of Frederick.  
Sue Wadel, Mayor Pro Tem

My commission expires: 6/30/7

Witness my hand and official seal.

Yvonne Mincer  
Notary Public





3408528 08/02/2006 04:02P Weld County, CO  
13 of 13 R 66.00 D 0.00 Steve Moreno Clerk & Recorder

**EXHIBIT A**  
**TO**  
**DEED OF CONSERVATION EASEMENT**  
**(Legal Description of Property)**

Outlot 3, Spindle Hill Energy Center Annexation No. 2, recorded <sup>August</sup>~~July~~ \_\_\_\_\_, 2006 at  
Reception No. \_\_\_\_\_, County of Weld, State of Colorado.